

attempt to gain an advantage which would be denied him had he conducted himself appropriately, and had not provided any Court with any justification for his actions.

Finally, as noted by the Ninth Circuit Court of Appeals, the Eighth Circuit Court of Appeals has already considered this issue and found the jury instructions to be unambiguous and in accord with Missouri law. (A. 3a n.1, citing *Harre v. Muegler*, 113 F.3d 909 (1997)). The Court of Appeals for the Eighth Circuit stated that the jury instructions "taken as a whole fairly and adequately stated the law." *Id.* at 912.

The essential elements of fraud, under Missouri law, are:

(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity or his ignorance of the truth; (5) the speaker's intent that his representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury. *Manzer v. Sanchez*, 985 S.W.2d 936, 940 (Mo.App. E.D. 1999).

The above quoted law does not allow for a finding of fraud unless the representation contained in element (1) is the same representation referenced in the remaining elements. Missouri law would not sanction a finding of fraud under the hypotheticals Debtor presents to this Court regarding the "one or more" language. The Eighth Circuit, having already considered Debtor's argument, found that the instructions at issue fairly stated the law, and there can be no doubt that Debtor's argument, were it properly presented, would fail on its merits. *Harre*, 113 F.3d at 911, 912.

Because debtor waived his ambiguous jury instructions argument by failing to timely present same and the jury instructions at issue were not ambiguous and complied with Missouri law, Creditors respectfully request that this Court deny Debtor's Petition for Certiorari Review.

CONCLUSION

Because the Ninth Circuit Court of Appeals correctly affirmed the United States District Court's affirmation of the Bankruptcy Court's Order granting Creditors' Motion for Summary Judgment, Creditors respectfully request that this Court deny Debtor's Petition for Certiorari Review.

Respectfully submitted,

RICHARD EDWARDS

(Counsel of Record)

EDWARDS, SCHRAMM, YOUNG &
BEILENSON, LLP

231 South Bemiston, Suite 1200

St. Louis, Missouri 63105

Telephone: (314) 862-5900

Facsimile: (314) 725-2073

DAVID G. WALTRIP

CHAD S. STOCKEL

SPOENEMAN, WATKINS, WALTRIP &
HARVELL, LLP

8000 Maryland, Suite 600

St. Louis, Missouri 63105

Telephone: (314) 862-1110

Facsimile: (314) 862-1105

Counsel for Respondents